

Message Text

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ORIGIN STR-07

INFO OCT-01 IO-13 ISO-00 STRE-00 AGRE-00 CEA-01
CIAE-00 COME-00 DODE-00 EB-08 FRB-03 H-01 INR-10
INT-05 L-03 LAB-04 NSAE-00 NSC-05 PA-01 CTME-00
AID-05 SS-15 ITC-01 TRSE-00 ICA-11 SP-02 SOE-02
OMB-01 DOE-15 AF-10 ARA-10 EA-10 EUR-12 NEA-11
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APPROVED BY STR:RHEIMLICH
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COMMERCE:DSCHLECHTY
TREASURY:EBARBER
;GRICULTURE:RSCHROETER
DEFENSE:HGILSTER
MB:LHAUGH
STATE:JSPIRO
TPSC:WKELLY

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FM SECSTATE WASHDC
TO USMISSION GENEVA PRIORITY

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E.O. 11652: N/A

TAGS: ETRD,MTN

SUBJECT: GOVERNMENT PROCUREMENT

REF: GENEVA 6590

1. FOLLOWING GUIDANCE PROVIDED IN RESPONSE TO REFTEL.

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2. WITH REGARD TO YOUR TEXT ON PART IV - TENDERING PROCE-
DURES:

A. PLEASE INSERT A COMMA AFTER THE WORD "SUPPLIED"ON LINE
3 OF PARAGRAPH 4.

B. IN PARAGRAPH 6 REPLACE "ECONOMIC AND PRACTICAL CONSID-

ERATIONS RELATED TO THE PROPOSED PURCHASE" WITH "EFFICIENT OPERATION OF THE PROCUREMENT SYSTEM". THE FORMER LANGUAGE IS INTENDED TO REFLECT THE LATTER BUT IT IS TOO BROAD FOR OUR NEEDS.

C. TO TAKE CARE OF THE ROTATION PROBLEM REFERRED TO IN PARA. 3 OF REFTEL, WE SUGGEST THAT THE FOLLOWING BE ADDED TO PARA. 6 OF PART IV BEFORE THE SENTENCE BEGINNING "ALL

SUPPLIERS REQUESTING ...": "AS A GENERAL RULE INVITATIONS TO TENDER SHALL BE SENT TO ALL SUPPLIERS ON THE BIDDERS' LIST, AND TO ANY OTHER POTENTIAL SUPPLIERS WHO REQUEST THE OPPORTUNITY TO PARTICIPATE. HOWEVER, TO PREVENT EXCESSIVE ADMINISTRATIVE COSTS, THE PURCHASING ENTITY MAY USE A SYSTEM OF ROTATION, OR SELECT ONLY PART OF A LIST, WHEN THE NUMBER OF SUPPLIERS ON A LIST IS CONSIDERED EXCESSIVE IN RELATION TO A SPECIFIC PURCHASE. IN DOING SO, ENTITIES SHALL NOT DISCRIMINATE IN FAVOR OF DOMESTIC SUPPLIERS NOR DISCRIMINATE AMONG FOREIGN SUPPLIERS".

D. WE HAVE NO EXPLANATION FROM YOU AS TO WHY X AND Y WERE SUBSTITUTED FOR A FIXED NUMBER OF DAYS IN PARA. 9(A) AND 9(B). NOTWITHSTANDING, IT MAY BE USEFUL FOR YOU TO KNOW THAT 30 DAYS AS A NORMAL RULE OR 15 DAYS AS A MINIMUM RULE IN EITHER INSTANCE WOULD NOT PROVIDE A PROBLEM UNDER U.S. PROCEDURES.

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E. THE LANGUAGE, "INSOFAR AS PROVIDED FOR BY NATIONAL LEGISLATION;" IN PARA. 11(E) IS VIEWED HERE AS CAPABLE OF UNDERCUTTING THE PRECEDING LANGUAGE AS WELL AS THE NORMATIVE RULE WE SEEK IN PARA. 13(D). ROY HAUGH'S RECOLLECTION IS THAT THE LANGUAGE WAS IN FACT DROPPED. IF THIS IS NOT SO PLEASE WORK FOR ITS DELETION.

F. WE RECOGNIZE THAT THE LANGUAGE "ALLOWED TO SUBMIT A TENDER", IN PARA. 12(B) IS PROBABLY ONE OF THOSE COMPROMISES THAT RESULT FROM LANGUAGE DIFFERENCES. WE CONSIDER, HOWEVER, THAT THE WORD "ALLOWED", WILL PERMIT TOO MUCH FREEDOM IN THE PROCURING AGENCY. WE THEREFORE SUGGEST THAT THE LANGUAGE BE DROPPED AND THE PROBLEM HANDLED BY MERELY INSERTING THE WORD "INTERESTED" BEFORE "SUPPLIER" IN THE PREVIOUS LINE.

G. FOR REASONS DISCUSSED PREVIOUSLY, WE STILL THINK THAT "WORKS OF ART" IN PARA. 14(B) AND THE ENTIRETY OF 14(E) ARE UNNECESSARY TO TAKE CARE OF WHAT WE UNDERSTAND THE CONCERNS TO BE OF THE EC. NOTWITHSTANDING, WE WOULD PROBABLY BE PREPARED ULTIMATELY TO YIELD ON BOTH POINTS.

(IN THE LATTER REGARD WE PREFER THE FOLLOWING FORMULATION: "TO DEVELOP A PROTOTYPE AS A RESULT OF A CONTRACT FOR RESEARCH, STUDY OR EXPERIMENT.") UNTIL SUCH TIME AS THE EC AND OTHERS ARE PREPARED TO REMOVE THE "IRREGULAR" PROBLEM IN 14(A) AND ACCEPT OUR LANGUAGE NOW IN BRACKETS AT THE END OF PARA. 14(D), WE PREFER TO KEEP BRACKETS AROUND (B) AND (E).

3. OFFSETS - OUR INDUSTRY ADVISERS ARE STILL DIVIDED ON THIS ISSUE. LABOR ADVISERS ARE SOLIDLY OPPOSED TO OFFSETS AS A CONDITION FOR AWARDS. WE ARE UNABLE TO MOVE FROM OUR EXISTING POSITION UNTIL THIS SITUATION IS CLARIFIED.

4. NATIONAL SECURITY EXCEPTION - AS DELEGATION IS AWARE
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WE EARLIER CONSIDERED THE OPTIONS RECENTLY PUT FORWARD BY EC (E.G. SEE PG. 12 OF ANNEX TO TPSC 78-13). FACTORS OTHER THAN THE NATURE OF GOODS MUST FIGURE IN WHETHER OR NOT A PRODUCT IS OF A NATIONAL SECURITY NATURE. FOR EXAMPLE, A BURGLAR ALARM SYSTEM IS NOT NORMALLY SO CLASSIFIED BUT, IF IT IS DESIGNED TO PROTECT THE NATIONAL MINT, IT IS. NEITHER A NEGATIVE OR POSITIVE LIST WILL TAKE CARE OF THIS PROBLEM. THE U.S. SUPPORTS A TIGHTLY DRAWN NORMATIVE RULE FOR THIS PROPOSAL. THE EC NORMATIVE RULE IS TOO LOOSE, AND WE FAIL TO SEE HOW EITHER POSITIVE OR NEGATIVE LIST WILL HELP MAKE SUCH A RULE MORE EFFECTIVE. AT THE SAME TIME, WE ARE AWARE OF THE PROBLEM RAISED BY THE EC IN THEIR SUGGESTION THAT STEEL, TEXTILE, AND FOOTWEAR PRODUCTS, FOR MILITARY USE, BE EXCLUDED AS SENSITIVE ITEMS. CONSEQUENTLY, YOU MAY WISH TO INDICATE TO EC THAT WE WOULD BE PREPARED TO COME BACK TO THIS POINT IN PHASE 11 POSSIBLY IN THE CONTEXT OF COVERAGE ON A PRODUCT BASIS. TO DO IT IN THE NATIONAL SECURITY CONTEXT WOULD, HOWEVER, IN OUR VIEW, DETRACT FROM OUR EFFORT TO INSURE AGAINST SUCH ACTIONS AS A FRENCH DETERMINATION THAT SEMICONDUCTOR PROCUREMENTS ARE SEIZED WITH A NATIONAL SECURITY ASPECT.

5. WE WOULD BE DISMAYED BY THE EC LIST OF ENTITIES PAPER IF WE DID NOT RECOGNIZE THAT THIS IS AN UPDATING OF THE OLD SUBMISSIONS OF THE MEMBER COUNTRIES TO THE OECD. CLEARLY THE COMMISSION HAS NOT PRESSED THE MEMBER COUNTRIES TO BE MORE FORTHCOMING. EC DELEGATION SHOULD BE URGED BOTH TO EXPAND SCOPE OF MEMBER STATE OFFERS AND ALSO TO STANDARDIZE THE PRESENTATION OF THE SUBMISSIONS AMONG MEMBER STATES. THE ENTITY REQUESTS LISTS WE ARE NOW PREPARING WILL GO FAR BEYOND THE CITED LISTS.

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6. S AND D - AS YOU KNOW FROM OTHER SOURCES, AN S AND D APPROACH HAS NOT YET BEEN FORMALIZED. THE INTERAGENCY PROCESS TO DATE, HOWEVER, CLEARLY ARGUES AGAINST ANY FAVORABLE RESPONSE TO LEMMEL'S "PERSONAL" INITIATIVE. THE U.S. POSITION, ULTIMATELY, WILL LIKELY INCLUDE A CONDITIONAL MFN POSITION IN THIS CODE. LEMMEL'S PROPOSAL CONFLICTS WITH THIS. ADDITIONALLY, WE DO NOT EXPECT THAT THE U.S. POSITION BEING DEVELOPED WILL COUNTENANCE

ANY EXCEPTIONS INTENDED FOR THE PURPOSE OF "THE PROMOTION OF DEVELOPMENT GOALS OF DEVELOPING COUNTRIES". A SAFE ASSUMPTION WOULD BE THAT OUR DEVELOPING POSITION WILL NOT EVEN BE ABLE TO ACCEPT THE RHETORIC OF SUBPARAGRAPHS (A), (B), AND (C) OF HIS PARA. 1.

7. FINAL PROVISIONS - WE HAVE A NUMBER OF QUESTIONS AND/OR COMMENTS ON EC, ALTHOUGH SOME OF OUR PROBLEMS MAY BE INABILITY TO MASTER FRENCH DRAFT:

(A) WITH REGARD TO ADHERENCE (DRAFT ART. 4) TO THE CODE AFTER IT GOES INTO EFFECT. WE BELIEVE THERE SHOULD BE EXPRESS PROVISION FOR NEGOTIATION OF ENTITY COVERAGE WITH NEW ADHERENT.

(B) THE RELATIONSHIP OF THE CODE TO NATIONAL LAWS (DRAFT ART. 6) MAY RAISE SOME PROBLEMS. WE WOULD AT THIS POINT APPRECIATE MTN DEL VIEWS. POSSIBLE CONCERN IS LACK OF BALANCE IN FIRST PARA. REQUIRING CHANGE IN DOMESTIC LAW AND SECOND PARA. WHICH WOULD PRESUMABLY ENFORCE CODE OBLIGATIONS WHERE DISCRIMINATION IS A PROBLEM OF ADMINISTRATIVE PRACTICE, NOT A LEGAL REQUIREMENT. THIS GOES TO THE HEART OF QUESTION AND RAISES ISSUE OF HOW, FOR EXAMPLE, EC WILL ENFORCE CODE OBLIGATIONS ON QUASI GOVERNMENTAL ENTITIES.

(C) WE BELIEVE ART. 7 ON DURATION OF AGREEMENT SHOULD BE LIMITED OFFICIAL USE

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DROPPED. WE DO NOT LIKE THE PROSPECT OF LAPSE OF AGREEMENT IN TEN YEARS HENCE. IF EC INTEREST IS IN IMPROVING CODE THROUGH RENEGOTIATION AFTER TEN YEARS OPERATION, A PREFERABLE WAY MIGHT BE TO PROVIDE FOR A REVIEW OF OPERATION OF CODE WITH A VIEW TO NECESSARY IMPROVEMENTS, IN TEN YEARS.

(D) DRAFT ART. 9, AS WE READ IT, MAKES AMENDMENT FAR TOO DIFFICULT. IT APPEARS AS IF A NUMBER OF COUNTRIES WOULD HAVE A VETO OVER AMENDMENT. THIS CAN VIRTUALLY PRECLUDE CONSTRUCTIVE MODIFICATION OF AGREEMENT TO MEET CHANGED CIRCUMSTANCE. WE SUGGEST FOLLOWING LANGUAGE: "AMENDMENTS TO THIS AGREEMENT SHALL BECOME EFFECTIVE, IN RESPECT OF SUCH SIGNATORY GOVERNMENTS WHICH ACCEPT THEM, UPON ACCEPTANCE OF 2/3 OF THE SIGNATORY GOVERNMENTS AND THEREAFTER FOR EACH OTHER PARTY UPON ACCEPTANCE BY IT." VANCE

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